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In the

Supreme Court of the United States

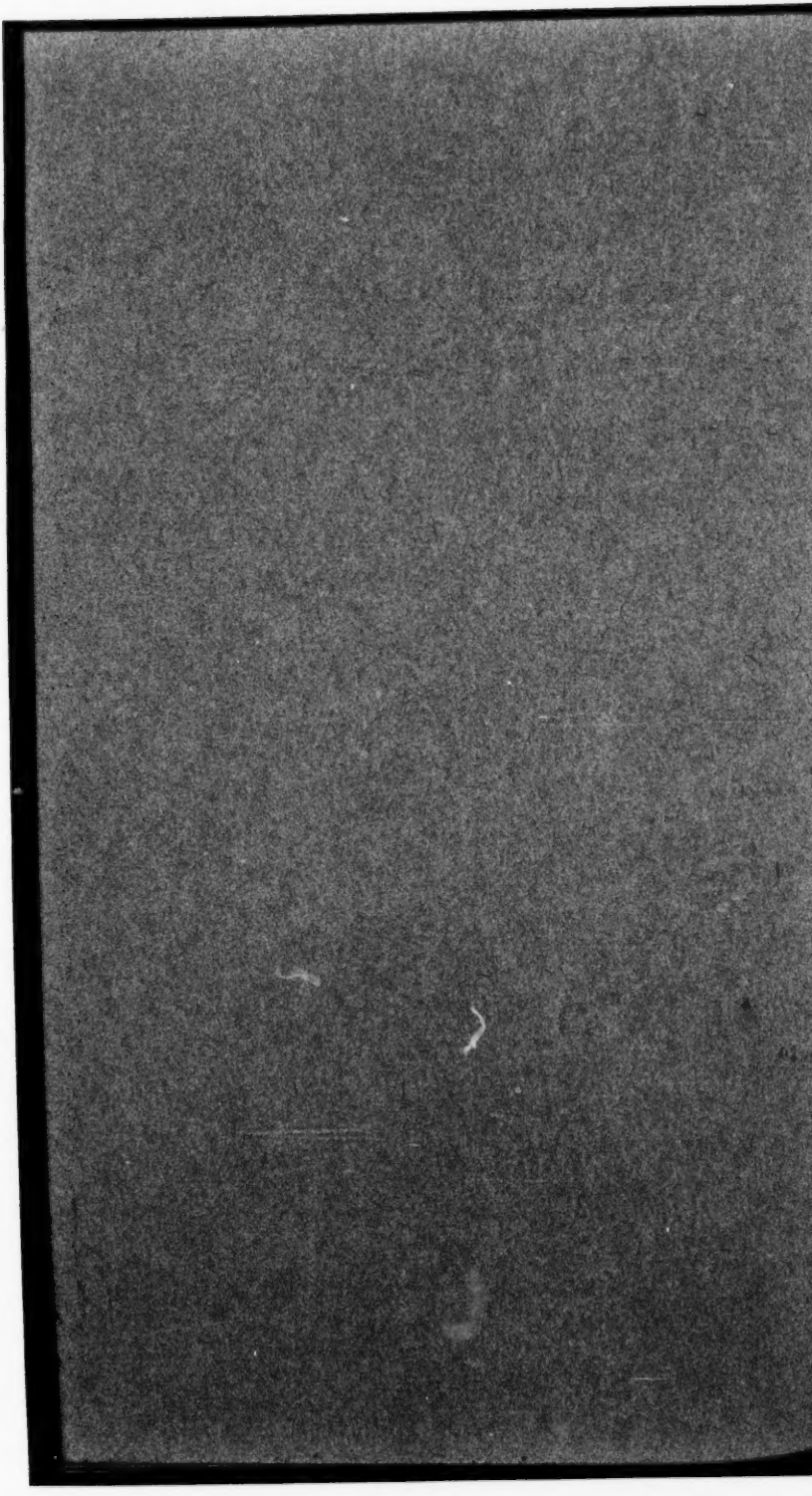
No. 546

JAMES WINFRED HUFF, and
JOE EZRA JOHNSTON,
Petitioners, and Appellants below

v.

UNITED STATES OF AMERICA,
Respondent, and Appellee below

Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit



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No._____

JAMES WINFRED HUFF, and
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v.

UNITED STATES OF AMERICA,
Respondent, and Appellee Below

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled case on November 23, 1951.

I.

OPINION BELOW

The opinion of the Court of Appeals, Fifth Circuit is contained in the record (R. 376-383).

II.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The United States Federal Grand Jury for the Northern District of Georgia, on October 5, 1949 returned an indictment against the appellants, James Winfred Huff and Joe Ezra Johnston (R. 1-11). This indictment alleges that the appellants, with each other, and with twenty-one others named therein did conspire to defraud the United States and to violate Sections 2803, 2810, 2833, 2834, and 3321 of Title 26 USCA, and specifies thirty overt acts as having been committed by one or more of the conspirators in furtherance of the conspiracy. The indictment further charges that the conspiracy began on or about January 1, 1947 and continued until on or about January 1, 1949, and said conspiracy was in violation of Section 88, Title 18, USCA, and in violation of Section 371, Title 18, USCA, effective September 1, 1948.

This case was regularly called for trial on October 30, 1950 and the defendants Huff and Johnston entered a plea of not guilty. The case proceeded to trial, terminating on November 3, 1950 at which time the jury returned a verdict of guilty. The evidence adduced in said trial is contained in the record beginning on page 30 through page 267.

After conviction, the defendants' attorney filed a motion for new trial on November 8, 1950, which motion was overruled on November 9, 1950 (R. 12-13). After overruling defendants' motion for new trial, each defendant was sentenced to five years' imprisonment and sentences were deferred until December 11, 1950. Verbal notice of appeal was entered on Novem-

ber 9, 1950 and the court declined to fix an appeal bond. (R. 28). Subsequent to November 9th, the present attorneys of record were employed (R. 359) and on December 8 filed a notice of appeal in said case (R. 22). This notice was returned by the Clerk of the Court (R. 23) and thereafter on January 9, 1951, appellants filed a motion to set aside the order of November 9, 1950, overruling the motion for new trial and to require the Clerk of the United States District Court for the Northern District of Georgia to serve defendants with a notice required by Rule 49c, Rules of Criminal Procedure in order that appellants could file a notice of appeal in said case. The respondent filed an answer thereto and the same came on to be heard on the 12th day of January 1951, and after hearing same, the court entered its order (R. 26) setting aside its previous order of November 9, 1950 overruling defendants' motion for new trial. The court on the same day, January 12, 1951, entered a new order overruling the motion for new trial in said case (R. 27) and to this order the petitioners filed a notice of appeal therefrom on January 17, 1951 (R. 366 & 367).

Petitioners also filed a motion for correction of sentence on January 9, 1951 which was overruled on January 12, 1951 (R. 14 & 15) and to which ruling the petitioners filed a notice of appeal filed January 17, 1951 (R. 364 & 365).

Before the appeal in said case came on for argument the respondent filed a motion in the Court of Appeals to dismiss the appeal from the order denying the new trial (R. 374-375). Said motion together with the appeals in said case were argued before the United States Court of Appeals on October 16, 1951 and on November 23, 1951, United States Court of Appeals, Fifth Circuit rendered its judgment (R. 383) sus-

taining the motion to dismiss and dismissing petitioners' appeal from the judgment of the District Court overruling petitioners' motion for a new trial, and affirmed the judgment of the District Court (R.15), denying petitioners' motion for correction of sentence. The case thus illegally terminated.

The petitioners on December 20, 1951 made application for an extension of time within which to file a petition for writ of certiorari, which application was granted and the time for filing said petition was extended by this court until January 22, 1952 (R. 384).

III.

JURISDICTION

The jurisdiction of this court is invoked under the provisions of Title 28, United States Code, Section 1254 (1) for the review for writ of certiorari to the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case which was entered November 23, 1951.

IV.

QUESTIONS PRESENTED

Re-Dismissal of Appeal on Motion of Appellee

1. Under Rule 37 (a) (2), Federal Rules of Criminal Procedure, does the ten day period for filing a notice of appeal from an order overruling a timely written motion for a new trial begin to run from the time of the signing of the order or from the receipt of notice of entry of the order required by Rule 49 (c), Federal Rules of Criminal Procedure?

2. Under Rule 49 (c), Federal Rules of Criminal Procedure, is the Clerk of the Court required in every instance to mail the notice contemplated therein?

3. Does the failure of the Clerk to mail the notice required by Rule 49 (c), Federal Rules of Criminal Procedure, extend the time for filing a notice of appeal?

4. Does the presence of movants and counsel in court at the time the order is signed relieve the Clerk from the requirement of giving notice as required by Rule 49 (c)?

RE-MOTION FOR CORRECTION OF SENTENCE

1. Is a continuing conspiracy a complete offense upon formation of the agreement and commission of one overt act in furtherance of the agreement?

2. Is the criminal statute in force at the time of the conspiracy agreement and commission of the first overt act applicable to that offense for purposes of prosecution?

3. Where a continuing conspiracy began in April 1947 and continued until December 1948, is a statute enacted and made effective September 1, 1948 which increases the penalty for the conspiracy offense, ex post facto as to that offense?

4. Is the sentence of five years in this case in excess of the maximum authorized by law for the offense charged in the indictment?

RULES AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure

Rule 37 (a) (2) Time for Taking Appeal. An ap-

peal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10 day period an appeal from a judgment of conviction may be taken within 10 days after the entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Rule 49 (c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing.

Title 18, Section 88, United States Code. (Criminal Code, 37.) Conspiring to commit offense against the United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Title 18, Section 371, USC, effective Sept. 1, 1948. Conspiracy to commit offense or to defraud United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such per-

sons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals Erred.

1. In sustaining the motion to dismiss and dismissing petitioners' appeal from the order denying petitioners' motion for a new trial.

2. In affirming the judgment of the District Court holding the sentence of five years to be applicable in this case.

3. In affirming the order of the District Court denying the motion for correction of sentence on the ground that same was in excess of the maximum authorized by law for the offense charged in the indictment.

4. In dismissing the appeal and failing to review petitioners' motion for a new trial on the following grounds:

a. That the verdict was contrary to and against the weight of evidence when considered with the offense charged in the indictment.

b. That the verdict was contrary to and against the law and evidence when considered with the offense charged in the indictment.

c. That there was a prejudicial variance between the evidence and the offense charged in the indictment.

REASONS FOR GRANTING THE WRIT

As this case involves two appeals, one of which was dismissed and the other being decided against petitioners, the reasons for granting the writ will be stated separately as to each appeal.

ON DISMISSAL OF PETITIONERS' APPEAL IN THE MAIN CASE

1. *There exists a direct conflict between the decisions of the court below and the decisions of several courts of appeal and this Honorable Court.*

In considering the conflict of decisions, we wish to again state the applicable portion of the rule:

> 49 (c) Federal Rules of Criminal Procedure: "Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk SHALL mail to each party affected thereby a notice thereof and SHALL make a note in the docket of the mailing.

The court below in this case held that no consequence attached to the failure of the clerk to give the prescribed notice and that the time for appeal began to run on November 9, 1950.

It will be noted by this court that the order overruling petitioners written motion for a new trial was signed on November 9, 1950 (R-13). No notice of the entry of the order was mailed to the petitioners or their counsel as required by Rule 49 (c) (R. 332 and R-26, par. 3).

The court below in this case also held that the action by the trial judge of setting aside the court's first order and the re-entry of a *pro forma* order again denying

petitioners' motion for a new trial was not warranted (R. 380).

The conflict between the decision of the court below and other Court of Appeals decisions is very clearly shown in the decisions of the *Court of Appeals for the Tenth Circuit in Carter vs. United States* and the *Court of Appeals for the Second Circuit in Oddo vs. United States.* The decisions in the above cases are as follows:

> *Carter vs. United States,* 168 Fed 2nd 310-311 Court of Appeals, Tenth Circuit. July 14, 1948 (5) Rule 49 (c) of the New Rules xxx, provides that "immediately upon the entry of an order made on a written motion the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing." The parties to an order are entitled to rely upon the requirement of this rule, and *the time for appeal does not run against the order until the prescribed notice has been given.* Hill vs. Hawes, 320 US 520, 64 S Ct 334, 88 L. Ed. 283, 149 A. L. R. 736. It follows therefore, that if the clerk omitted to mail the notice, the time for taking the appeal from the original order of XXXX has not yet expired.
>
> (6) The Court is specifically authorized under Rule 36 of the New Criminal Rules to correct clerical mistakes arising from oversight or omission at any time. If, therefore, the Clerk omitted to give the required notice of the order of xxxx, it was not only within the competence of the trial court to correct the clerical mistake, BUT IT HAD THE DUTY TO DO SO. xxxx.

The decisions of the Court below in this case and the

Court of Appeals, Tenth Circuit, in Carter vs. United States, supra, are in direct conflict, although both cases are decided on facts which are almost identical.

> *Oddo vs. United States*, 171 Fed 2nd 854 Court of Appeal, Second Circuit, Jan. 5, 1949.
> (1) The ten-day period in which appeal must be taken does not begin to run until receipt of the clerk's notice of entry of order. Federal Rules of Criminal Procedure, rules 37 (a) (1, 2), 49 (c), 18 USCA.

The court in its opinion held as above quoted and also stated that additional support for this view may be found in the court's discussion in Hill vs. Hawes, 320 US 520, 523, 64 S. C. T. 334. The court also states "*it would seem pointless to require notification by the clerk of the court unless the party for whose benefit the provision exists is entitled to rely on receipt of the notice.*" .(italics supplied)

The *Oddo* case clearly construes Rule 49 (c) to *require the clerk to give notice* and that the ten-day period for filing a notice of appeal under Rule 37 (a) (2) does not begin to run until receipt of the notice. This interpretation is in close harmony with the decision of the Tenth Circuit in the Carter case supra. However, the ruling of the Fifth Circuit, in the present case, that "*no consequence attached to the failure of the Clerk to give the prescribed notice and that the time for appeal begin to run on November* 9, 1950" is in direct conflict with the decisions of the Second and Tenth Circuit Court of Appeals.

In the Case of Hill vs. Hawes, 320 vs. 520 64 S. Ct. 334 This Court held:

> (2) It is true that Rule 77 (d) does not purport to attack any consequence to the failure of the

> Clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may be well that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule. xxxx.

Although the above decision interpreted a rule of civil procedure, the rule in this case (Rule 49 (c), Federal Rules of Criminal Procedure) is an adaptation of Rule 77 (d). The court below has interpreted Rule 49 (c) contrary to the interpretation of this Court of a Rule with substantially the same wording. The court below cited as authority for its interpretation, the case of *Credit Company vs. Arkansas Central R. Co.*, 128 US 258, which is the same case cited by Mr. Chief Justice STONE in his dissenting opinion in Hill v. Hawes, supra.

It is therefore shown that the conflict between the decision of the court below and decisions of this Court and other Courts of Appeal is so pronounced as to be irreconcilable and it is urged that this court grant the writ in order that the conflicting decision may be corrected.

RE-MOTION FOR CORRECTION OF SENTENCE

Petitioners insist that the ruling of the court below that, "*a statute imposing a greater penalty for a conspiracy, where the crime is still being carried on and continued after the date when the act becomes effective does not violate the constitutional inhibition of ex post facto laws*" is erroneous and that the court should have held that the offense of conspiracy charged in the indictment was a completed offense under Section 88,

Title 18, USC, and petitioners were subject only to a maximum sentence of two years.

As stated by the court below, we are aware of no Federal Appellate Court decision in point. The court below relied upon the decisions of two State Courts which petitioners feel are in no way controlling.

The court below in its decision relies heavily upon the decision of this court in *Hyde and Schneider vs. United States* 225 US 347. We wish to point out that in this case there were four dissenting Justices. The court below in its opinion also apparently misconstrued the contentions of the petitioners as to the relationship of an overt act to the crime of conspiracy. Petitioners insisted in that court and do so in this petition that the offense of conspiracy is a completed offense upon the commission of an overt act by any of the conspirators and at that time all parties to such conspiracy become liable. It is the further contention of your petitioners that the purpose of the overt act required by the criminal statute is to consummate a crime cognizable by judicial tribunals and thereby confer jurisdiction of the crime; to permit an abandonment of the conspiracy; and to fix a time from which the statute of limitations commences to run.

Petitioners insist that the decision of the court below now interprets the effect of the overt act as creating a new offense punishable under a different statute from the statute in force at the time of the completion of the offense by the commission of the first overt act.

> This court held in Braverman vs. United States, 317 US 49, 87 Law Ed. 23 that "the single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute. For such a violation only the single penalty prescribed by the statute can be imposed."

Petitioners insist that the effect of the decision of the court below conflicts with and is contrary to the rule in Braverman vs. United States, supra. in that the decision permits prosecution under either of the conspiracy statutes, Section 88, Title 18 USCA or Section 371, Title 18, USCA. Petitioners urge that this decision is erroneous and that this court should grant the writ of certiorari in order to resolve the conflict and decide the question involved.

And now, within the time provided by law and by order of this court, after final order in the matter to wit; the judgment of the United States Court of Appeals, Fifth Circuit (R. 383) rendered on November 23, 1951, of which complaint is made.

Petitioners pray that a writ of certiorari issue under the seal of this court to the United States Court of Appeals, Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the proceedings of the said court had in the cause numbered and entered in its docket as number 13516, *James Winfred Huff and Joe Ezra Johnston vs. United States of America*, to the end that this case may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment therein of the said United States Court of Appeals, Fifth Circuit, be reversed by this court, and for such further relief as to this court may seem proper.

JAMES WINFRED HUFF
JOE EZRA JOHNSTON
Petitioners

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In the

Supreme Court of the United States

No._____

JAMES WINFRED HUFF, and
JOE EZRA JOHNSTON,
Petitioners, and Appellants Below

v.

UNITED STATES OF AMERICA
Respondent, and Appellee Below

Brief in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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I.

OPINION BELOW

The opinion of the Court of Appeals, Fifth Circuit is contained in the record (R. 376-383).

II.

GROUNDS FOR JURISDICTION

This case being a criminal case in which a final judgment has been made by the Court of Appeals, Fifth Circuit, jurisdiction is invoked under the provisions of Title 28, Section 1254 (1), and the petition for writ of certiorari is made under the provisions of Rule 37 (b) Federal Rules of Criminal Procedure.

III.

STATEMENT OF THE CASE

This is a criminal case involving an interpretation of Rule 37 (a) (2) and Rule 49 (c), Federal Rules of Criminal Procedure and to determine the applicable sentence in a continuing conspiracy which began while Title 18, Section 88, USCA was in force and continued until after Section 371 Title 18, USCA became effective. The petitioners were tried and found guilty on November 3, 1950. A timely motion for new trial was overruled in open court on November 9, 1950 (R. 12-13). No written notice of appeal to the order of November 9, was filed, however the docket entries (R. 28) show that verbal notice of appeal was entered. Petitioners were each sentenced to a period of five years. The petitioners were represented by other counsel up to this point in the proceedings. Subsequent to the date of sentence, and after 10 days had expired, petitioners employed the present counsel of record in the Appellate

Court and on December 8, 1950 a notice of appeal was submitted in said case. The same was returned without filing and petitioners then filed a motion on January 9, 1951 to set aside the order of November 9, 1950 and to require compliance with Rule 49 (c). Petitioners at the same time filed a motion for correction of sentence on the ground that the five year sentence was in excess of the maximum provided by law.

The District Court on January 12, 1951 overruled the motion for correction of sentence and on the motion to set aside the previous order of November 9, the District Court denied the relief prayed for under Rule 49 (c), Federal Rules of Criminal Procedure but set aside its previous order and entered a new order overruling petitioners' motion for new trial. To both orders, petitioners filed a notice of appeal to the United States Court of Appeals, Fifth Circuit.

In the matter of the notice of appeal of petitioners to the overruling of their motion for new trial, the respondent filed a motion in the Appellate Court to dismiss the same for lack of jurisdiction. After hearing argument on this motion and on the notice of appeal in both matters, the United States Circuit Court of Appeals, Fifth Circuit on November 23, 1951 rendered its judgment (R. 383) sustaining the motion to dismiss petitioners' appeal from the order overruling the motion for new trial and affirming the judgment of the District Court denying petitioners' motion for correction of sentence. The case thus illegally terminated.

IV.

SPECIFICATION OF ERRORS TO BE URGED IN THIS BRIEF

1. The Court of Appeals committed error in sustaining the motion to dismiss and dismissing petition-

ers' appeal from the order denying their motion for new trial.

2. The Court of Appeals committed error in affirming the judgment of the District Court denying the motion for correction of sentence.

V.

ARGUMENT AND CITATION OF AUTHORITIES SUMMARY

In considering the conflicting decisions and the interpretations of Rule 37 (a) (2) and Rule 49 (c), we believe the only cases in point are shown in the petition herein. We think it is clear that the decision of the Fifth Circuit Court of Appeals conflicts with the decisions of the Second and Tenth Circuits. It is apparent that the Fifth Circuit in this case interpreted Rule 49 (c), not from the standpoint of law, but from the standpoint of facts in the case. We believe that the interpretation should be based upon legal principles and not upon the facts of each individual case. To decide the applicability of a rule upon the facts in each case not only leads to indecision and confusion but results in a failure of criminal procedure. The court below in its opinion found that the order of November 9, 1950 was signed in the presence of the petitioners. We submit that this is incorrect as the record shows (R. 26) that the trial court, after hearing evidence on the matter, found that the order was signed in open court and the petitioners and their counsel of record were present in court. The court did not find that the order was signed in the presence of the petitioners and counsel. The court below also finds that there is no suggestion that petitioners relied on the provisions of Rule 49 (c) and says that petitioners had actual notice

of the entry of the order. With this finding, petitioners cannot agree as the same is contrary to and in conflict with the finding of the trial court (R. 26).

Rule 37 (a) (2) has been relaxed in many instances in order to permit an appeal. Petitioners show that this is a case wherein an appeal should have been allowed and not dismissed. It is apparent from the record that petitioners intended to appeal the decision of the trial judge overruling their motion for a new trial. This is clear by the docket entry (R. 28) "November 9, 1950 Verbal notice of appeal entered—court declined to fix appeal bond (from rough minutes)." The court will also note that the trial attorney did not again appear in this case after sentence was made. The trial judge on hearing petitioners' motion for compliance with Rule 49 (c) stated (R. 359) "*there are some factors in this case that would cause me to regret very much if they did not get an opportunity to appeal it to the higher court. xxxx. I think I know why it was not carried up by the original counsel. It is just unfortunate after the sentence and after the motion was overruled, their counsel, the counsel they had at the trial has never taken any steps or communicated with the court as far as I know, whether he is out of it or not, I don't know, but there is a little skip there between the time you Gentlemen first approached me about it, and were in the case, there is a little skip that is a legal vacuum as far as I can tell, I don't know about it, but during that transition or changing the attorneys, and you Gentlemen coming in and finding out what happened and making your motion. It is very unfortunate for the defendants in this case that all that should have happened during this time for appeal and cause the time to run out.*" (italics supplied)

We insist that from the action taken at the time of

sentence in notifying the court of the intention to appeal the case and from the statement of the trial judge, the presumption arises that either the trial attorney waited for notice under Rule 49 (c) or else abandoned his clients without filing a notice of appeal. We insist that the trial court was not without authority and did not abuse his discretion in the matter in setting aside his previous order of November 9, 1950 and entering a new order from which an appeal was taken. We urge that in so doing, the trial court was tracking the decision of this court in *Hill vs. Hawes* 320 US 520-524 wherein this court said "But we think it was competent for the trial judge in the view that the petitioners relied upon the provisions of Rule 77 (d) with respect to notice and in the exercise of a sound discretion, to vacate the former judgment and to enter a new judgment xxx."

The court below ruled that the act of the trial judge was not warranted under the authority of *Credit Company vs. Arkansas Central Railway*, 128 US 258 which is the decision cited in the dissenting opinion in Hill vs. Hawes, Supra.

The case of Hill vs. Hawes, supra is discussed by The Court below in its opinion. (R. 378, 379). The petitioners disagree with the treatment given the case by the Court below. It is true that subsequent to the decision by this court, Rule 77 (d), Federal Rules of Civil Procedure, was amended along with Rule 73 (a). However, these rules relate to civil procedure and it is not conceded that application of them can be made in criminal cases. Much of the language of the Court below in its discussion of Hill vs. Hawes seems to be taken from *Barron's Federal Practice and Procedure, Vol.* 4, *Rules Edition, Par.* 2336, *Page* 322. Petitioners

also wish to use the language of the text book, wherein the writer, on page 322, says:

"Motions for new trial and motions in arrest of judgment in criminal cases are governed by the Federal Rules of Criminal Procedure. Rule 49 (c) is an adaption of Civil Rule 77 (d) *before* the 1948 amendment of the latter. Rules 37 (a) and 49 (c) were not amended. Until the Supreme Court amends these rules and provides relief comparable to that afforded by the 1948 amendments to civil rules 73 (a) and 77 (d), it is reasonable to suppose that the method pointed out in the case of Hill vs. Hawes will be available to relieve defendants whose failure to learn of the entry of an order denying a motion for new trial or an arrest of judgment is due to failure of the clerk of the court to mail notice of entry of the order as required by Rule 49 (c)."

Petitioners insist and urge that the decisions of the court below is in conflict with the decisions in the cases of *Carter v. United States* 168 *Fed* 2nd 310, *Tenth Circuit; Oddo v. United States* 171 *Fed* 2nd 854, *Second Circuit;* and *Hill v. Hawes* 320 *U. S.* 520, 64 S. Ct. 334, all of which are set out in the petition for certiorari. Petitioners respectfully urge that a writ of certiorari should issue in this case to resolve the conflict of decisions.

The court below also affiirmed the judgment of the trial court in denying petitioners' motion for correction of sentence on the ground that the five year sentence imposed in this case was in excess of the maximum authorized by law. Petitioners insist that the ruling of the court below is erroneous and should be reversed.

The indictment in this case charged a continuing

conspiracy beginning on or about January 1, 1947 and continuing until on or about January 1, 1949 in violation of Section 88, Title 18, USCA, and in violation of Section 371, Title 18 USCA, effective September 1, 1948. The indictment and the evidence shows that the first 22 of the 30 overt acts alleged were committed during the period April 3, 1947 to August 24, 1948. The remaining eight overt acts were committed between the period of September 1, 1948 and December 7, 1948.

Section 88, Title 18 USCA was repealed in 1948 and a new section enacted which is Section 371, Title 18 USCA. The new section became effective September 1, 1948. There was no change in the law except the penalty for a crime of conspiracy was increased from two years to five years. The change in this law increasing the penalty occurred during the latter part of the continuing conspiracy. The court below held that this was not a case where the appellants were subjected to a greater penalty by committing a crime which had been consummated before the statute increasing the penalty was passed and became effective. The petitioners cannot agree with the ruling of the court below.

The petitioners contend that the crime was consummated upon the meeting of minds between the conspirators in an agreement to commit certain offenses and upon the commission of an overt act toward the object of the agreement.

A conspiracy once proved to exist must be deemed to continue until the contrary is established although a conspiracy is complete with the commission of the fiirst overt act in the sense that the word is ordinarily used to represent a conspiracy *US v. Perlstein* et al 126 Fed 2nd 789.

The offenses of conspiracy become complete when the agreement is made and the only effect of the statutory requirement that an overt act be shown is to permit an abandonment of the conspiracy in the meantime and the subsequent avoidance of the penalty which the statute imposes *US v. Manton* 107 *Fed* 2nd 834.

Petitioners contend that the overt act required by statute in conspiracy cases has the effect of consummating a crime to the extent that liability therefor is incurred by the conspirators upon the commission of the act and therefore the statute in force at that time is the applicable statute for prosecution of the crime. The repeated commission of similar overt acts, as is true in this case, does not create a new crime but merely continues the existing crime for the purpose of permitting an abandonment of the crime or determining the time from which the statute of limitations shall begin to run in order to avoid prosecution.

The conspiracy as alleged and shown in this case could not have been an offense in violation of Section 371, Title 18 USCA prior to September 1, 1948, the effective date of said statute. It necessarily follows therefore that the conspiracy had to be an offense in violation of Section 88, Title 18 USCA. We cannot conceive that the changing of the statute would in any way change the crime which had already been committed. We therefore insist that the present statute, Section 371, Title 18 USCA is inapplicable in this case because the same increases the penalty for the crime alleged in the indictment and therefore is an ex post facto law as to this case.

CONCLUSION

In conclusion petitioners respectfully urge that the

decision of the Court of Appeals, Fifth Circuit as to the interpretation of Rule 49 (c) Federal Rules of Criminal Procedure is in direct conflict with the decisions of this court and other appellate courts and that this court should grant a writ of certiorari to resolve the conflict. Petitioners respectfully urge that to permit the decision of the Fifth Circuit Court of Appeals to stand in this case will result in the delegation of judicial powers of the courts to the clerks of the various district courts and permit each of them to interpret this rule in accordance with the facts of each case. We cannot conceive that such is a proper interpretation or the purpose of this rule.

The decision of the Court of Appeals, Fifth Circuit in this case concerning the applicability of Section 371, Title 18, USCA is the first Federal Appellate Court decision so far as we can determine. Petitioners respectfully urge that it is contrary to and conflicts with the rule as laid down by this court in *Braverman v. United States* 317 US 49, 87 L. Ed. 23 and is erroneous.

Petitioners respectfully submit that both parts of the decision of the court below in this case warrant the issuance of the writ of certiorari to the Court of Appeals, Fifth Circuit in order that its decision may be reviewed.

Most Respectfully submitted,

MYER I. GOLDBERG
Attorney for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 546

JAMES WINFRED HUFF AND JOE EZRA JOHNSTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 376-383) is reported at 192 F. 2d 911.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1951 (R. 383). By order dated December 20, 1951, the Chief Justice extended the time for filing a petition for a writ of

certiorari to and including January 22, 1952 (R. 384). The petition was filed on January 21, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) See also Rules 37 (b) (2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the District Court had power to extend the time for appeal by setting aside an order denying a motion for a new trial and entering a later order to the same effect.

2. Whether 18 U.S.C. 371, which increased the penalty for conspiracy from two to five years imprisonment, is an *ex post facto* law as applied to a conspiracy which, although commenced before, was continued by overt acts after its effective date.

STATUTES AND RULES INVOLVED

Section 371, Title 18 U.S.C. [1948 revision] provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 37, Criminal Code of 1909, 18 U.S.C. [1946 ed.] 88, provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Rule 37(a) (2), F. R. Crim. P. provides in pertinent part:

> Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. * * *

Rule 45(b), F. R. Crim. P. provides:

> When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of

> excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

Rule 49(c), F. R. Crim. P. provides:

> Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing.

STATEMENT

On October 5, 1949, an indictment was returned in the United States District Court for the Northern District of Georgia charging petitioners with conspiracy to violate the Internal Revenue Laws [1] which prohibit the distillation, possession, purchase, sale, transportation, and concealment of non-tax paid liquors, in violation of 18 U.S.C. 371, *supra,* and its precursor, Section 37, Criminal Code of 1909, 18 U.S.C. [1946 ed.] 88 (R. 1-11).[2] The indictment alleged that the conspiracy began on January 1, 1947 and continued until January 1, 1949. It alleged 30 overt acts in furtherance of the conspiracy, 22 of which occurred prior to September 1, 1948, the effective date of Section 371, and eight thereafter (R. 4-11). Of these last eight

[1] Sections 2803, 2810, 2833, 2834, 3321, Title 26 U.S.C.

[2] Section 371 is a reenactment of the old Section 37 of the Criminal Code except that the penalty was increased from two to five years.

overt acts petitioner Huff participated in five and petitioner Johnston in four.

On November 3, 1950, the jury returned a general verdict of guilty as to both petitioners (R. 12). A written motion for a new trial, on the ground that the verdict was contrary to the evidence, was filed on November 8 (R. 12-13). The next day, November 9, the court orally overruled the motion, immediately caused the preparation of a written order to conform with his ruling, and signed it, all in open court with petitioners and their counsel present (R. 26, 362). The court then sentenced each petitioner to imprisonment for a term of five years (R. 16) and, after petitioners' counsel verbally indicated an intention to appeal, the court declined to fix an appeal bond (R. 28, 357). In conformance with local practice where the parties had actual notice, the clerk of the court did not mail to petitioners a notice of the entry of the order of November 9 denying a new trial as required by Rule 49(c), F. R. Crim. P. (R. 24, 26).

On December 8, 29 days later, petitioners through new counsel, mailed to the clerk notice of appeal which was returned because it was not filed within ten days after the entry of the order denying the motion for a new trial, as required by Rule 37(a)(2) (R. 22-23). On January 9, 1951, petitioners moved the court to set aside the order of November 9 denying a new trial and to require the clerk to conform with Rule 49(c) (R. 19-21). On

the same day, petitioners also filed a motion for correction of sentence, claiming that the indictment, when properly construed, charged an offense under old Section 37 of the Criminal Code, Title 18 U.S.C. [1946 ed.] 88 for which the maximum punishment was two years (R. 14).

After a hearing, the judge found that he had signed the order of November 9 in open court with both petitioners and their counsel present. He concluded that, in such case Rule 49(c) did not require the clerk to mail a notice of the order to the parties. Nevertheless, the judge, although entertaining doubt as to his authority to do so, as a matter of discretion, in order to permit petitioners to appeal, set aside the order of November 9 and entered a new order overruling the motion for a new trial (R. 26-27, 359-360, 362). On the same day, January 12, the court overruled the motion for correction of sentence (R. 15).

Petitioners took two appeals, one from the judgment of November 9 and the order of January 12 denying a new trial, and the other from the order denying the motion for correction of sentence (R. 364-367).

The Court of Appeals dismissed the appeal from the judgment of November 9 and order of January 12 denying a new trial, and affirmed the order overruling the motion for correction of sentence (R. 376-383). As to the basic judgment, the court held that since "there is no suggestion that appellants

relied on the provisions of Rule 49(c), Federal Rules of Criminal Procedure, and it affirmatively appears that they had actual notice of the entry of the order" of November 9, "there was no circumstances present to invoke the court's discretionary powers." (R. 4-5.) As to the motion for correction of sentence, the court held that the "statute imposing a greater penalty for a conspiracy, where the crime is still being carried on and continued after the date when the act becomes effective does not violate the constitutional inhibition of *ex post facto* laws" (R. 382-383).[3]

ARGUMENT

1. Petitioners contend (Pet. 8-11, 18-22) that Rule 49(c) modifies the provisions of Rule 37(a)(2) so that the ten days for taking an appeal does not ~~being~~ failure to run until the clerk mails the required notice of the entry of an order, or at least that the District Court was warranted in extending the time for taking the appeal by setting aside the first order denying a new trial, and entering a like order on January 12, 1951. As the court below held, however, the Notes of the Advisory Committee conclusively negative any possible inference from the rule that the failure to mail the notice *per se* extends the time, or is cause for the court to extend the time, for taking an appeal. Those Notes state:

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[3] This appeal was timely as the motion was denied on January 12 and a notice of appeal filed on January 16. A motion to correct an illegal sentence may be made at any time. 28 U.S.C. 2255; Rule 35, F. R. Crim. P.

> This rule is an adaptation for criminal proceedings of Rule 77(d) of the Federal Rules of Civil Procedure. No consequence attaches to the failure of the clerk to give the prescribed notice, but in a case in which the losing party in reliance on the clerk's obligation to send a notice failed to file a timely notice of appeal, it was held competent for the trial judge, in the exercise of sound discretion, to vacate the judgment because of clerk's failure to give notice and to enter a new judgment, the term of court not having expired. *Hill* v. *Hawes,* 64 S. Ct. 334, 320 U.S. 520, 88 L. Ed. 282, rehearing denied 64 S. Ct. 515, 321 U.S. 801, 88 L. Ed. 1088.

Petitioners and their counsel were present in court when the motion for a new trial was denied and a conforming order signed. It is clear that petitioner's counsel understood that the motion was denied for he then entered a verbal notice of appeal and requested the court to fix an appeal bond (R. 28). Indeed, petitioners do not contend, nor did they show, that they did not have notice of the order or that their failure to take a timely appeal was in any way caused by the clerk's neglect to mail the notice. No evidence was introduced to explain why petitioners did not file a timely notice of appeal. The mere fact that they later employed different counsel who advised them to appeal does not excuse their failure to take a timely appeal. Cf. *Ackermann* v. *United States,* 340 U.S. 193. As the court below held, petitioners did not show any circumstances which warranted the District Court,

in the exercise of a sound discretion, in extending the time for taking the appeal by the device of setting aside its original order and entering a later one.

The purpose of Rule 37(a)(2) is to set a definite time beyond which criminal appeals cannot be taken and to force their early prosecution. See *United States ex rel. Coy* v. *United States;* 316 U.S. 342, 344-346; *Fewox* v. *United States,* 77 F. 2d 699, 700 (C.A. 5); cf. *Matton Co.* v. *Murphy,* 319 U.S. 412, 415. Rule 45(b) (*supra,* pp. 3-4) specifically denies to the court the power to enlarge the time for moving for a new trial or taking an appeal. Hence, except where the aggrieved party has relied upon the clerk to give him notice of the order to be appealed from,[4] the court has no authority to extend that time either directly or indirectly. See *Credit Co.* v. *Arkansas Central Railway,* 128 U.S. 258, 261; *United States* v. *Infusino,* 131 F. 2d 617 (C.A. 7). As petitioners did not show any reason which justified the District Court's action in extending the time for their appeal, the court below properly dismissed the appeal because it was taken too late.

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[4] Petitioners claim (Pet. 9-11, 20-21) that the decision below is in conflict with *Hill* v. *Hawes,* 320 U.S. 520; *Oddo* v. *United States,* 171 F. 2d 854 (C.A. 2), certiorari denied, 337 U.S. 943, and *Carter* v. *United States,* 168 F. 2d 310 (C.A. 10). In all those cases, however, the losing party had relied upon receipt of the notice from the clerk. Both Oddo and Carter were imprisoned at Alcatraz. *Oddo* v. *United States,* 171 F. 2d at 855; the records of the Bureau of Prisons show that when his motion was denied Carter was incarcerated at Alcatraz.

2. Petitioners contend that the application in this case of the increased penalty provision of Section 371 violated the constitutional prohibition of *ex post facto* laws (Pet. 11-13, 21-23). They do not deny that the conspiracy continued past the effective date of Section 371. Their argument is that, as a single conspiracy can constitute only one offense (*Braverman* v. *United States,* 317 U.S. 49) and as all necessary elements of the offense were completed upon the commission of the first overt act, the punishment must be fixed as of the time the offense was first completed.

It has, however, long been settled that conspiracy is a continuing offense. *Hyde and Schneider* v. *United States,* 225 U.S. 347. See also *Fiswick* v. *United States,* 329 U.S. 211, 216; *United States* v. *Kissel,* 218 U.S. 601, 607.[5]

The evidence is clear that after the effective date of Section 371 petitioners participated in overt acts which furthered the conspiracy (R. 50-56, 76-79, 103, 149-164, 182). Hence, all elements of the offense of conspiracy—the agreement and overt acts in furtherance thereof—were committed after the 1948 amendment. Petitioners were thus punished under the 1948 law for a subsequent, and not a prior act. In *Nyquist* v. *United States,* 2 F. 2d 504 (C.A. 6), certiorari denied, 267 U.S. 606, a con-

[5] Because the offense is continuous the statute of limitations runs from the last overt act during the existence of the conspiracy. See *Fiswick* v. *United States, supra,* at 216; *Brown* v. *Elliott,* 225 U.S. 392, 401.

viction under the Dyer Act on a charge of conspiracy to transport stolen automobiles was upheld although the conspiracy was entered into before the passage of that act, but continued thereafter. To the same effect, on substantially the same facts, is *Bailey* v. *United States,* 5 F. 2d 437 (C.A. 5), petition for a writ of certiorari dismissed, 269 U.S. 551, 589. Similarly, in *United States* v. *Perlstein,* 126 F. 2d 789 (C.A. 3), certiorari denied, 316 U.S. 678, a conviction of conspiracy to obstruct justice was upheld where the agreement was formulated before, but continued after, the judicial proceedings which it was designed to obstruct were begun, although it was not an offense to conspire to obstruct non-existent proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1952.

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